

Kimat Mal and ors. Vs. the State

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Court : Allahabad

Decided On : Jan-04-1956

Reported in : AIR1956All449; 1956CriLJ952

Judge : Mehrotra and ;Sahai, JJ.

Acts : [Public Gambling Act, 1867](#) - Sections 5 and 6; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 79

Appeal No. : Criminal Revn. No. 381 of 1954

Appellant : Kimat Mal and ors.

Respondent : The State

Advocate for Def. : Government Adv.

Advocate for Pet/Ap. : M.N. Shukla, Adv.

Disposition : Revision allowed

Judgement :

Mehrotra, J.

1. This is a revision which has been referred to a Bench by a Single Judge of this Court.

2. The applicants were tried under Sections 3/4, Public Gambling Act, for being found gambling at stakes with cards while Pamandas applicant was taking out nal from the money staked on the phar on 23-9-1952, at about 5-30 p.m. at shop No. 8/90, Arya Nagar Market, by the Nawabganj police. All the applicants denied the allegations of the prosecution.

The Magistrate, after considering the evidence, accepted the prosecution story and convicted them under Section 4, Public Gambling Act, and sentenced them to pay a fine of Rs. 200/- each and in default to undergo rigorous imprisonment of three months. Pamandas was further sentenced to a fine of Rs. 300/- under Section 3 of the Act and in default to undergo further rigorous imprisonment of three months.

3. The applicants went up in appeal to the Sessions Judge of Kanpur against their convictions taut their appeal was rejected and the convictions and sentences passed against them were upheld by the Additional Sessions Judge, Kanpur. On the question of sentence, however, a reference was made to this Court by the Sessions Judge and that was rejected on 18-8-1954.

4. The present revision was filed against the orders of the Additional Sessions Judge and the Magistrate convicting the applicants and it came up for hearing before a Single Judge who has referred this case, as we have already pointed out, to a Bench. The main point which was urged by the counsel for the applicants before the Single Judge was that in this case the house was searched by Sri Athar Ahmad Sub-Inspector, while the warrant which was issued by the Magistrate for the search of the house was in the name of the Station Officer of Police Station Nawabganj under Section 5, Pubic Gambling Act, and the contention raised by the applicants is that it was not open to the Station Officer to endorse the said warrant in the name of Sri Athar Ahmad Sub-Inspector.

The search made by Sri Athar Ahmad consequent upon the endorsement of the warrant in his favour was not a search made in accordance with and under the provisions of Section 5, Public Gambling Act. The search being illegal, no presumption under Section 6 of the Act could arise against the applicants.

It will be necessary at this stage, to point out that the learned Single Judge, when the matter came up before him, after considering the facts of the case, remarked that 'it will not be possible to uphold the convictions of the accused without raising presumption under Section 6, Public Gambling Act.' But as there were a few cases decided by this Court in which it was held that it was open to an officer, in whose favour a warrant has been issued under Section 5, Public Gambling Act, by a Magistrate, to pass it on to another police officer not below the rank of a Sub-Inspector, to make the search, with which the Single Judge was not inclined to agree, he referred this case to a Bench. Section 5, Public Gambling Act, provides that--

'If the Magistrate of a district, or other officer invested with the full powers of a Magistrate, or the District Superintendent of Police, upon credible information, and after such enquiry as he may think necessary, has reason to believe that any house, room, tent, walled enclosure, space, vehicle, vessel or place is used as a common gaming-house;

'he may either himself enter, or by his warrant, authorise any officer of police, not below such rank as the State Government shall appoint in this behalf, to enter, with such assistance as may be found necessary, by night or by day, and by force, if necessary, any such house, room, tent, walled enclosure, space, vehicle, vessel or place;

and may either himself take into custody, or authorise such officer to take into custody, all persons whom he or such officer find therein, whether or not then actually gaming;

and may seize or authorise such officer to seize all instruments of gaming, and all moneys, and securities for money, and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming, which are found therein;

and may search or authorise such officer to search all parts of the house, room, tent, walled enclosure, space, vehicle, vessel or place, which he or such officer shall have so entered when he or such officer has reason to believe that any

instruments for gaming are concealed therein, and also the persons of those whom he or such officer takes into custody;

and may seize or authorise such officer to seize and take possession of instruments of gaming found upon such search.'

Section 6 of the Act provides that-

'When any cards, dice, gaming-table, cloths, boards or other instruments of gaming are found in any house, room, tent, walled enclosure, space, vehicle, vessel or place entered or searched under the provisions of the last preceding section, or about the person of any of those who are found therein, it shall be evidence, until the contrary is made to appear, that such house, room, tent, walled enclosure, space, vehicle, vessel or place is used as a common gaming-house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the Magistrate or Police Officer, or any of his assistants.'

It will appear from the perusal of Section 6 that under that section a presumption can be raised against a person who is found present in the gaming-house and if cards and other things are found at a place, the place can be presumed to be a gaming-house and although the actual play is not seen there going on, still a presumption can be raised against the person who is found there and from whose person a card or such things have been seized. The presumption under Section 6, therefore, encroaches upon the liberty of a person and has got to be strictly construed.

A presumption under Section 6 can only be raised if a search has been made under the provisions of the last preceding section and unless the search has been made in accordance with the provisions of Section 5, such a search cannot be said to have been made under the provisions of the last preceding section.

It is, therefore, to be seen whether Section 5 authorises a person in whose favour a warrant has been issued by the Magistrate to pass on the warrant for execution to another officer, not below the rank of a person so authorised by the State

Government. It will be clear from the provisions of Section 5 that the section does not authorise a Magistrate or any other officer empowered to make a search, only to search certain premises as is done under a search warrant issued under the Code of Criminal Procedure but it further authorises the officer to take into custody any person who is found in the premises, to seize all instruments of gaming which are found there or to search every part of the house.

The powers, therefore, conferred under the provisions of Section 5 are much wider than the powers given to an officer who is authorised to make a search under a search warrant issued under the Code of Criminal Procedure and when such wide powers are conferred on such an officer under Section 5 Public Gambling Act, it is reasonable to hold that such powers were intended by the Legislature to be exercised either by the Magistrate himself who acts on certain information received by him or a person specifically nominated by him.

No power, in these circumstances, could have been intended to be given to a person, who has been specifically authorised by a Magistrate, to further delegate that power to another officer. There is nothing in Section 5 which empowers a person, authorised by the Magistrate to make a search, to further delegate that power to another officer.

As there is a conflict of opinion on this point in various High Courts, it is necessary to refer to some of the cases of this Court as well as of other Courts dealing with this point. Reference was made to the case of -- 'Emperor v. Kashi Nath', 30 All 60 (A).

That was a decision by a Single Judge of this Court in which it was held that warrants issued under Act No. 3 of 1867 are governed by those provisions of the Code of Criminal Procedure which provide for the issue and execution of warrants in general: there is, therefore, no objection to the officer to whom such a warrant is originally issued endorsing it to another officer, provided that the latter is an officer to whom such warrant could) be legally issued in the first instance.

At page 62 of the said Report it has been observed that

'there is nothing in Act No. 3 of 1867 which would prevent the passing on of the warrant to another officer, provided always that such latter officer was not of a rank below the rank authorised under the Act to enter & search. It is contended that the officer who executed the warrant was below the rank of officer who could execute a warrant under Act No. 3 of 1867.

THAT ACT empowers a Magistrate to authorize any police officer not below the rank of a Sub-Inspector of Police to enter and search a house. There is no provision requiring the Magistrate to mark by name the particular officer who is to execute the warrant. The view I take is that warrants issued under Act No. 3 of 1867 are governed by those provisions of the Code of Criminal Procedure which provide for the issue and execution of warrants in general'.

This decision is based on two grounds: Firstly, it is based on the ground that there is no particular prohibition under Section 5, Public Gambling Act, for an officer in whose favour a warrant has been issued by a Magistrate to pass it on to another officer. The only restriction is that the officer, who makes the search, should not be below the rank of an officer specially authorised by the State Government.

In our opinion, there is an obvious fallacy in this reasoning. The power to make a search, which will lead to a presumption under Section 6, Public Gambling Act, is to be found within the ambit of Section 5 itself. Section 5 itself, in express terms, only authorises that Magistrate who has information or the District Superintendent of Police or an officer authorised by him to make a search.

It does not, in express terms, give any authority to an officer, in whose favour a warrant is issued, to delegate his power to make the search to another officer. The question, therefore, of any prohibition under Section 5 to that effect does not arise. As we interpret Section 5 Public Gambling Act, there is no power given to an officer, in whose favour a warrant has been issued, to delegate such a power to another officer.

The only restriction placed on the power of the Magistrate to issue a warrant is that it should not be issued in favour of an officer below the rank of an officer specially empowered by the State Government, but the section does not empower a further

delegation of the power itself to another officer.

The second line of reasoning, on which the decision in '30 All 60 (A)' is based, is that Section 5 only gives power to a Magistrate or his authorised) officer to make a search. It does not provide the procedure for the execution of such a warrant and for the purpose of execution, the provisions of the Code of Criminal Procedure can be applied. In our opinion, this reasoning is also not very sound.

When a search is made under the provisions of Section 5, Public Gambling Act, in order to give rise to presumption under Section 6, it is not a case of execution of warrant. Under the Code of Criminal Procedure, a Magistrate is given statutory powers to issue certain warrants and the officer, who carries out that direction, only executes the warrant and it may be that the statute itself may give a special power to the officer who is asked to execute a warrant, to pass it on, for purposes of execution, to another officer competent to execute it, but under Section 5, a Magistrate has a certain power which vests in him and it is open to him to give an authority to another officer to exercise a similar power.

The question thus really is whether any other officer empowered by an officer who has been authorised by a Magistrate, when making a search, is only executing the warrant or is exercising the authority which vests in the Magistrate himself. It is a case of delegation of authority. It is not a case of execution of warrant. Apart from this, Section 79, Criminal P. C., provides that:

'A warrant directed to any police-officer may also be executed by any other police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed'.

Section 79 occurs in the chapter headed as 'Warrant of Arrest'. It, therefore, provides for execution of a warrant of arrest issued under Section 75, Criminal P. C.

Section 96, Criminal P. C. gives power to a Magistrate to issue a search warrant and Section 101 makes Section 79 applicable to warrants issued) for search of houses under Sections 96, 99A and 100, Criminal P. C.

Section 101, therefore, has made Section 79 expressly applicable to warrants of search under Sections 96, 99A and 100, Criminal P. C. Therefore, there is no provision by which the provisions of Section 79 have been made applicable to a warrant issued under Section 5, Public Gambling Act, and consequently, it is not open, in our opinion, for an officer, in whose favour an authority has been granted under Section 5 to make a search, to (make?) a delegation of such an authority to another officer.

The decision in '30 All 60 (A)' was followed in -- 'Mahadeo v. Emperor', 1920 All 150 (AIR V7) (B). In that case no reasons are given. The case in '30 All 60 (A)' has been followed and, the learned Single Judge was of opinion that it was not open to the Magistrate to have ignored the decision of this Court in '30 All 60 (A)' and the Magistrate should have followed that case. Another case relied upon by the State Counsel is the one reported in -- 'Ramprasad v. Emperor, 1945 Nag 216 (AIR V32) (C).

That case also has followed the decision of this Court with which we are not inclined to agree. The petitioners' counsel has mainly relied upon the case of -- 'Kundan Lal v. Emperor', 1948 Lah 81 (AIR V35) (D). In that case it has been held by a Division Bench of the Lahore High Court that 'the warrant issued under Section 5 is a special warrant and is not a general warrant of search which is usually issued under the provisions of Criminal P. C. Section 5, Gambling Act, requires a Court to decide that a particular person should be entrusted with the execution of the warrant and, therefore, the operation of Sections 75 and 79, Criminal P. C., is automatically barred.

Hence where a warrant is issued under Section 5, Gambling Act, to a particular officer and that officer, instead of executing it himself, endorses it to another officer, and the warrant is executed by such another officer, the presumption under Section 6 cannot be raised'. To the same effect is the view of the Bombay High Court reported in -- 'Emperor v. Thavarmal Rupchand', 1929 Bom 157 (AIR V16) (E), at page 160 and the Calcutta High Court reported in -- 'Emperor v. Govinda Chandra : AIR1940 Cal586 . In a case of this Court reported in--'Rure Mal v. Emperor : AIR1929 All937 , it was held by this court that the provisions of Section

103, Criminal P. C. do not apply to the case of a search made in accordance with a warrant issued under Section 5 Public Gambling Act.

The contention of the petitioners counsel is that the same reasoning should apply to the present case. If the provisions of Section 103, which lay down the procedure for the execution of a search warrant issued under the Code of Criminal Procedure, do not apply to a warrant issued under Section 5, Public Gambling Act, for the same reason, the provisions of Section 79, Criminal P. C. cannot be made applicable to a search made under a warrant issued under Section 5, Public Gambling Act.

We are of the opinion that if a warrant issued under Section 5 in favour of a particular officer by a Magistrate has been endorsed in favour of another officer and the search has been made by such an officer, such a search cannot be regarded as one in accordance with Section 5, Public Gambling Act, and the presumption under Section 6 will not be available to the prosecution in these circumstances.

As we have already pointed out, there is no ground to bring home the charge against the applicants under Section 4 unless a presumption under Section 6 can be raised against them and consequently, in view of our decision on the question of law, this revision must be allowed.

5. We, therefore, allow this revision and set aside the convictions of the applicants and the sentences passed against them. The fine, if realised, shall be refunded.

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